NO. 21810

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of

WESTERN GROWTH CORPORATION,

Bankrupt.

STEPHEN CRANE, III,

Applicant and Appellant,

vs.

CURTIS B. DANNING, etc.,

Respondent and Appellee

CURTIS B. DANNING, etc.,

Cross-Applicant,

vs.

LOUIS BENVENISTE, et al.,

Cross-Respondents and Appellants.

REPLY BRIEF OF APPELLANTS

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREENBERG & GLUSKER and
RICHARD H. FLOUM
9601 Wilshire Boulevard
Suite 544
Beverly Hills, California 90210

Attorneys for Appellants

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Attorneys for Appellants

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REPLY BRIEF OF APPELLANTS

I

APPELLEE'S MISSTATEMENT OF RECORD

A. "Subject-to" Issue.

Appellee, clearly recognizing the force of appellants' authorities on the issue of merger, attempts to avoid same by claiming that here the bankrupt purchased Escondido No. 3

subject to the Bower $210,000 deed of trust rather than, as argued by appellants (Opening Brief, pp. 8-11), expressly assuming same.

Thus, he argues:

> "There is no evidence that in addition they [Western Growth] assumed the encumbrance. Therefore, Western Growth is not and was not the primary or principal debtor. This distinction is of importance because in the citations of appellants, the person who paid or took an assignment of the debt was either the (1) borrower, or (2) had assumed the debt which led to an extinguishment of the debt." (Appellee's Brief, pp. 23-24, emphasis supplied)

And, again, in attempting to distinguish the key California case of Wilson v. McLaughlin, 20 Cal. App. 2d 608, 67 P. 2d 710, the appellee argues:

> "The foregoing paragraph in Wilson v. McLaughlin again points out the substantial difference between 'subject to' and 'assumption' of the debt." (Appellee's Brief, p. 28, emphasis supplied)

It is thus readily apparent that even appellee concedes that if the bankrupt corporation expressly assumed the obligation on the subject note and deed of trust, the doctrine of merger is applicable and consequently the bankrupt cannot assert the interests of the 16 of the original 31 investors against the remainder thereof.

Appellee obviously recognizes that if the issue is properly decided on its merits, the determination must be that the subject deed of trust was assumed by the bankrupt -- thus he nowhere disputes the analysis of this question contained in Appellants' Opening Brief, pp. 8-10. Therefore, he is forced to argue that the Pretrial Conference Order, Paragraph III-8, bars appellants from even raising what appears to him to be the pivotal and determinative question in this lawsuit.

In so arguing, appellee is guilty, although no doubt inadvertently, of a flagrant misstatement of the state of the record before this Court on this issue.

Thus, he completely ignores the fact that Referee Champlin specifically ordered the case re-opened for the taking of additional testimony on certain issues, including:

> " . . . .
>
> 4. Whether or not when Western Growth Corporation, the bankrupt, acquired the subject real property, it assumed the obligation to pay off the encumbrance thereon or took subject to said encumbrance." (C. T. 133)

Consequently the "subject-to" issue was fully litigated and the determination thereof subject to review by this Court.

B. Payments on the Encumbrance.

Appellee, apparently also recognizing that payments made by Bower on the subject note and deed of trust are themselves strong evidence of Bower's intent to be bound by the subject deed of trust, further misstates the record by blandly declaring that:

> "As stated in Appellants' Opening Brief at page 7, payments of said loan were made by Alan Realty Company, on behalf of the Bowers, during the period of time that the property was owned by the Bowers to the individual lenders."
> (Appellee's Brief, pp. 9-10)

In fact, Appellant's Opening Brief states at p. 7 that "Alan Realty Company . . . received payment [on the note and trust deed] from the Bowers and subsequently from the bankrupt (after it acquired the property) and it handled the accounting and depositing the moneys collected for many of the original 31 investors." (emphasis supplied) A check of the record citations and exhibits relied on in Appellants' Brief at page 7 will demonstrate the accuracy of this statement and the inaccuracy of appellee's.

II

THE SUBJECT NOTE AND DEED OF TRUST ARE VALID AND IN FULL FORCE AND EFFECT.

A. The Requisite Delivery Has Been Made Out in This Case.

Appellee completely ignores in his brief the fact that we deal in this case with a recorded deed of trust and the concomitant rules that (1) such recordation at the request of the maker thereof constitutes prima facie evidence of delivery with intent presently to convey or create the interest set forth therein and (2) that "recordation coupled with manual delivery raises a strong presumption, which can be overthrown only by very clear proof." 2 Witkin, Summary of California Law, Real Property §55. Here, we have both the recordation of the subject deed of trust and its delivery pursuant to its express terms to Alan Realty Company. It is thus totally beside the point whether Alan Realty Company was, as appellee contends, an exclusive agent for Bower or, as appellants contend, a dual agent acting for both Bower and the 31 investors. The controlling point is that the strong presumption of requisite delivery which arose by reason of the recordation of the deed of trust and its delivery to Alan Realty Company pursuant to the instructions of the Bowers, the makers thereof, has not been overcome by appellee.

Appellee relies on Miller v. Jansen, 21 Cal. 2d 473,

132 P. 2d 801, and Noble v. Learned, 153 Cal. 245, 94 Pac. 1047, which he describes as involving a "very similar situation." (Appellee's Brief, p. 13). What he neglects to inform the court is that in neither of these cases was there a recorded instrument giving rise to the presumption of delivery. Moreover, Noble v. Learned, the case which appellee contends involves a very similar situation, is clearly distinguishable for another reason: there, there was specific testimony by the person to whom the stock had been delivered, that the assignor thereof did not intend to effect a present transfer thereof (See 153 Cal. at 249).

B. Validity of Dry or Passive Trust.

Appellee concedes the correctness of appellants' position "that under the laws of the State of California a valid dry or passive trust may be created." (Appellee's Brief, p. 17) However, appellee argues that no such trust was created in the instant case, because Mr. White, the trustee, did not know who the beneficiaries were and, furthermore, because he had certain duties in respect to the deposit of the 31 investors' money into the escrow with the Bowers (Appellee's Brief, p. 18).

Here again, appellee misconceives the issue: the issue is not what White's duties were, vis-a-vis the escrow, but rather what his duties were vis-a-vis the note and deed of trust. In that regard White specifically testified (See Appellants' Opening Brief, pp. 6-7) that his name was on the subject note and deed of trust simply to facilitate the loan transaction by using one person

in behalf of and in the place of 31 investors who would hold title for them until the subdivision occurred. Therefore, obviously at any time any one of the 31 investors wished to have Mr. White removed, they could have done so -- hence, a classic dry or passive trust.

Finally, even if it were assumed arguendo that the subject dry or passive trust must fail for the reasons argued by appellee, or any other reason, this still would not help him since, under well-settled law, the trust res (the subject note and deed of trust) would automatically pass to the intended beneficiaries thereof who paid value therefor. So then these instruments were always capable of enforcement in such an eventuality by the 31 investors. (See 3 Scott on Trusts (1939 ed.)§412; 54 Am. Jur. Trusts §196, at n. 14, and 48 Cal. Jur. 2d Trusts §66, at notes 8 and 9.)

Hence, it is clear that the subject note and deed of trust were and are valid and subsisting instruments.

III

APPELLEE IS NOT ENTITLED TO ASSERT THE CLAIMS OF THE 16 ORIGINAL INVESTORS WHO ASSIGNED THEIR INTEREST IN THE NOTE AND DEED OF TRUST TO THE BANKRUPT IN 1960.

Appellants spent the major portion of their Opening Brief in arguing the efficacy of the above statement (See Appellants' Opening Brief, pp. 21-39). An analysis of appellee's response shows that he has been unable to come up with any authority contrary to

appellants' controlling authority and hence was forced to rely on the totally improper position that appellants have conceded that the bankrupt took the Escondido No. 3 property subject to the $210,000 Bower trust deed, rather than assuming same. But as demonstrated in the Opening Brief of Appellants (pp. 8-11), the finding or conclusion of law of Referee Champlin in this regard is clearly erroneous and is not binding on this Court which, under the authorities cited in Appellants' Opening Brief (p. 10, footnote 1), must construe and interpret a written instrument de novo. Since the bankrupt then was clearly an assuming grantee, all of the authorities relied upon by appellants (which have in no way been weakened or even disputed by appellee's)are controlling and require the determination sought by appellants herein. The plain fact of the matter is that, as demonstrated in Appellants' Opening Brief (pp. 35-39), the equitable prevention of merger doctrine has never been applied by any court in the entire land to permit a landowner to dilute another's lien of like priority to that acquired by the landowner, which would be the precise effect of the application of such a rule in the instant case. The Matzen and Jameson cases relied on by the appellee are clearly distinguishable (See Appellants' Opening Brief, p. 38), while the controlling California cases, Dodds v. Spring, 174 Cal. 412, 163 Pac. 351, and Wilson v. McLaughlin, 20 Cal. App. 2d 608, 67 P. 2d 710 (digested in Appellants' Opening Brief, pp. 26-28) require an adoption by this Court of appellants' view.

Finally, it must be noted that appellee has failed to

demonstrate -- although he asserts the fact to be true -- that if indeed the bankrupt purchased Escondido No. 3 subject to the Bower deed of trust, the result on merger would be any different. To the contrary, all the authorities appellants have found (Opening Brief, pp. 32-35) also uniformly support the rule contended for by them herein.

IV

CONCLUSION

More than 8 years after appellants, or those through whom they claim, made their investment, they are still fighting to recover some of their money, which can only be realized from a sale of Escondido No. 3. The Bower purchase escrow (2d Crane Exhibit 5) shows that the total purchase price for this land in 1959 was $70,000, $67,500 of which came from the escrow into which the $210,000 contributed by the 31 investors had gone. It is thus obvious that appellants herein can never hope to recover all of their money back from the liquidation of this property. To permit appellee to take more than one-half of the net proceeds which will be derived from the sale of Escondido No. 3 away from appellants, as Referee Champlin and Judge Clarke did, would be so unfair and so contrary to all existing law, that we cannot believe the Court will so hold.

The opinion of the District Court affirming Referee Champlin's order should be reversed and the lower court instructed to

enter an order in favor of appellants, permitting them to foreclose their deed of trust on Escondido No. 3 and to retain the net proceeds thereof, up to the sum of $84,452.36 plus interest thereon, which is the amount admittedly owed to them.

Respectfully submitted,

GREENBERG & GLUSKER and
RICHARD H. FLOUM

By: RICHARD H. FLOUM

Attorneys for Appellants.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ _____

RICHARD H. FLOUM